

LETTER OPINION
2005-L-32

October 11, 2005

Mr. A. W. Stokes
Richland County State's Attorney
413 3rd Ave N
Wahpeton, ND 58075-4427

Dear Mr. Stokes:

Thank you for requesting my opinion on two issues relating to changes made by Senate Bill 2300, which imposed restrictions on smoking in public places and places of employment. It is my opinion that an establishment cannot be a restaurant for part of the day where smoking is prohibited, and a bar for the rest of the day, in order to allow smoking. It is my further opinion that all locations at which smoking is prohibited are subject to that prohibition regardless of the hour of day or whether the public is permitted at a given time, except for private residence child care facilities.

ANALYSIS

Senate Bill number 2300 (SB 2300) made significant modifications to N.D.C.C. §§ 23-12-09, 23-12-10, 23-12-10.2, and 23-12-11, and enacted two new sections, N.D.C.C. §§ 23-12-10.3 and 34-06-03.2, all of which relate to new restrictions on smoking in public places and places of employment in North Dakota. 2005 N.D. Sess. Laws ch. 239. Section 23-12-10(1), N.D.C.C., now prohibits smoking in all enclosed areas of public places and places of employment except for those listed in N.D.C.C. § 23-12-10(2).

The definition of "public places" specifically includes restaurants. N.D.C.C. § 23-12-09(9). State law defines "restaurant" as follows:

"Restaurant" includes every building or other structure, or any part thereof, and all buildings in connection therewith that are kept, used, maintained, advertised, or held out to the public as a place where food is served, including coffee shops, cafeterias, private and public school cafeterias, kitchens, and catering facilities in which food is prepared on the premises for serving elsewhere, and a bar area within a restaurant.

N.D.C.C. § 23-12-09(11). Since smoking is prohibited in public places, and a restaurant is a public place, smoking is prohibited in restaurants.

One of the exceptions to the general no smoking requirement is for a “bar.” N.D.C.C. § 23-12-10(2)(f). Smoking is permitted within an establishment that falls within the definition of “bar” in N.D.C.C. § 23-12-09(1). Section 23-12-09(1), N.D.C.C., defines “bar” as follows:

“Bar” means a retail alcoholic beverage establishment licensed under chapter 5-02 that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which the serving of food is only incidental to the consumption of those beverages. The term includes a bar located within a hotel, bowling center, or restaurant that is not licensed primarily or exclusively to sell alcoholic beverages if the bar is in a separately enclosed area.

Your first question relates to the interplay between the definitions of “bar” and “restaurant” in N.D.C.C. § 23-12-09. You indicate that a local establishment would like to be a “restaurant,” with no smoking, until 9:00 p.m. and a “bar,” with smoking, thereafter. You question whether that is acceptable under the new no smoking laws.

There is nothing in either N.D.C.C. § 23-12-09 or § 23-12-10 that indicates an establishment can be both a part-time restaurant and a part-time bar. Section 23-12-10(1), N.D.C.C., prohibits smoking in “all enclosed areas” of both public places and places of employment, with no exception for the hour of day or whether customers are present. The only public places where smoking is allowed at certain times and not at others are private residences operating as “child care facilities subject to licensure by the department of human services.” N.D.C.C. §§ 23-10-09(9), 23-10-10(2)(a). If a “child cared for under that license” is present, then smoking is prohibited at that facility even if it is a private residence. Id. Smoking is only allowed if the facility is in a private home and none of the children are present. Id. Thus, the Legislative Assembly provided for certain hours of smoking and no smoking in one situation. The absence of a similar provision for restaurants and bars indicates the Legislative Assembly did not intend a similar treatment for those establishments. See N.D.A.G. 2001-L-38 (“[W]hen different phrases are used in similar contexts in related statutes, the Legislature intended different results to occur.”).

Further, “although exceptions in statutes are to be strictly, but reasonably, construed, they extend only so far as their language fairly warrants and all doubts are to be resolved in favor of the general provisions rather than the exception.” State v. Grenz, 437 N.W.2d 851, 854 (N.D. 1989). In this context, the “general provision” is a blanket prohibition against smoking in public places and places of employment. N.D.C.C. § 23-12-10(1). The exemption for bars in N.D.C.C. § 23-12-10(2) is an exception to that general no smoking provision. Although the exception must be reasonably construed, “any doubtful language must be resolved in favor of the general prohibition against smoking.” N.D.A.G. 2005-L-26. Since there is nothing in that exception indicating an establishment can be a

restaurant for part of the day and a bar for another, the statute must be construed in favor of the general no smoking provision and against creating a part-time bar exception.

Also, the notion that an establishment may be both a part-time bar and part-time restaurant is precluded by the definitions of “bar” and “restaurant” themselves. In order to be a “bar,” the establishment must be devoted to serving alcoholic beverages, and the sale of food can only be incidental to that main function. N.D.C.C. § 23-12-09(1). The “incidental” restriction requires the yearly gross food sales to be less than the yearly gross alcohol sales. N.D.A.G. 2005-L-21.

A “restaurant,” on the other hand, means the entire building in which a business is conducted that holds itself out as a place where food is served. N.D.C.C. § 23-12-09(11). Even “catering facilities in which food is prepared on the premises for serving elsewhere” are included within the definition of “restaurant.” Id. Thus, whether a customer is even allowed on the premises, regardless of the time of day, is irrelevant for purposes of the smoking prohibition – if an establishment falls within the definition of “restaurant,” smoking is prohibited throughout the facility,¹ regardless of the time of day or whether the establishment’s kitchen is operating at a particular time. Accordingly, it is my opinion an establishment is either a restaurant or a bar;² it cannot be a restaurant for part of the day and a bar for the rest of the day in order to allow smoking.

A “bar,” however, may serve food. It will be exempt from the no smoking prohibition as long as its annual gross food sales are less than its annual gross alcoholic beverage sales. N.D.A.G. 2005-L-21. A “bar” owner may voluntarily prohibit smoking for all or part of a day. But, if an establishment meets the requirements of a bar, it may not allow persons under 21 on the premises except in very limited situations.³ N.D.C.C.

¹ Except for separately enclosed bar areas located within a restaurant, which may allow smoking in certain circumstances. N.D.C.C. § 23-12-09(1).

² Other than a separately enclosed bar area within a restaurant. See N.D.C.C. § 23-12-09(1).

³ N.D.C.C. § 5-02-06 provides in part:

2. A person under twenty-one years of age may not remain in a restaurant where alcoholic beverages are being sold except if the restaurant is separated from the room in which alcoholic beverages are opened or mixed and gross sales of food are at least equal to gross sales of alcoholic beverages which are consumed in the dining area, or if the person is employed by the restaurant as a food waiter, food waitress, busboy, or busgirl under the direct supervision of a person twenty-one or more years of age and is not engaged in the sale, dispensing, delivery, or consumption of alcoholic beverages.

§ 5-02-06. If a bar's annual gross food sales are equal to or greater than its annual gross alcohol sales, however, it cannot be a "bar" under the no smoking laws and smoking is prohibited in the establishment.

In sum, an establishment may be a bar, and permit smoking if it is either a free standing establishment or in a separately enclosed area in a restaurant. The bar may serve food, but its annual food sales must be less than its alcohol sales. A bar that meets these criteria may permit or restrict smoking in the bar as it sees fit. But a bar may not allow the presence of anyone in the establishment who is under the age of 21 at any time, except in the limited circumstances noted. In all other cases, an establishment that serves food to the public is a restaurant, and smoking is not permitted at any time.

Your second question is, whether defined "public places" may be deemed non-public and allow smoking when they are closed or not open to the public. You correctly point out that the definition of "public place" refers to an area "to which the public has access or in which the public is permitted." See N.D.C.C. § 23-12-09(9). But smoking is prohibited "in any part" of a "restaurant," which is a public place, regardless of whether the public is allowed in a particular area. See N.D.C.C. § 23-12-09(11).

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3. A person under twenty-one years of age may enter and remain on the licensed premises if the person is an independent contractor or the independent contractor's employee engaged in contract work and is not engaged in selling, dispensing, delivering, or consuming alcoholic beverages; if the person is a law enforcement officer or other public official who enters the premises in the performance of official duty; or if the person enters the licensed premises for training, education, or research purposes under the supervision of a person twenty-one or more years of age with prior notification of the local licensing authority.
 4. A person under twenty-one years of age may remain in an area of a site where beer, wine, or sparkling wine is sold in accordance with the conditions of an event permit issued pursuant to section 5-02-01.1.
 5. A person who is nineteen years of age or older but under twenty-one years of age may be employed by a restaurant as provided in subsection 2 to serve and collect money for alcoholic beverages, if the person is under the direct supervision of a person twenty-one or more years of age, but may not be engaged in mixing, dispensing, or consuming alcoholic beverages. Any establishment where alcoholic beverages are sold may employ persons from eighteen to twenty-one years of age to work in the capacity of musicians under the direct supervision of a person twenty-one or more years of age.

Further, smoking is prohibited in all “places of employment,” without regarding to whether the public is allowed in a particular area.⁴ See N.D.C.C. §§ 23-12-10(1)(b), 23-12-09(8). When a “public place” is closed and the public is no longer present, it is still presumably a “place of employment” subject to the smoking prohibition. The only locations where the no smoking statutes prohibit smoking at certain times but allow it at others are private residence child-care facilities. Accordingly, it is my further opinion that all other locations where smoking is prohibited are subject to that prohibition regardless of the hour of day or whether the public is permitted to be present at a given time.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

⁴ Unless, of course, one of the exceptions in N.D.C.C. § 23-12-10(2) applies.